STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN PERRY,

Plaintiff-Appellant,

v

L & A MOBILE HOME REPAIR, INC.,

Defendant-Appellee,

and

JUDITH SARBER,

Defendant.

UNPUBLISHED
March 27, 2007

No. 272970
Kent Circuit Court
LC No. 05-007176-NO

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition in favor of defendant L & A Mobile Home Repair, Inc. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant Judith Sarber is the owner of a residence located in Grand Rapids, Michigan. In 2000, defendant Sarber contracted with defendant L & A for the delivery and assembly of a carport and all of its components on her property. Defendant L & A installed the gutter downspout on the side of the carport in such a manner that it drained onto defendant Sarber's driveway. That portion of the driveway is also part of the walkway to defendant Sarber's front door.

Plaintiff is defendant Sarber's sister. On February 5, 2005, plaintiff visited defendant Sarber's home to deliver some magazines and books to their parents who also resided at the home. Plaintiff parked her car in the attached carport and walked out of the carport and onto the walkway that led to defendant Sarber's front door. Plaintiff then slipped and fell onto the walkway, incurring injuries. Plaintiff believes she fell on ice that had accumulated underneath a puddle of water located below the gutter downspout.

Plaintiff brought claims of negligence and breach of contract against defendant L & A.[1] The trial court granted summary disposition in favor of defendant L & A on the ground that the allegedly dangerous condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Hazel v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). A genuine issue of material fact exists where the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Furthermore, whether defendant L & A owed a duty to plaintiff is a question of law, which we review de novo on appeal. *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002).

Plaintiff asserts that the open and obvious doctrine does not apply because this is neither a premises liability nor products liability case. We agree with plaintiff. Because defendant L & A did not own or possess the premises where plaintiff fell, any duty defendant L & A owed plaintiff would not be alleviated by application of the open and obvious doctrine. See e.g., *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). Furthermore, a review of plaintiff's complaint reveals allegations based almost entirely on defendant L & A's negligent placement of the gutter downspout. Thus, plaintiff's claim does not sound in products liability, but rather is based on the contract directing construction of the carport and its components. Accordingly, the trial court's grant of summary disposition in favor of defendant L & A on the basis that the icy condition was open and obvious was improper.

Nevertheless, we may affirm the trial court's decision to dismiss on a different ground. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998). Here, plaintiff was not a party to the carport construction contract and she does not claim to be a third-party beneficiary of the contract. Therefore, she was not owed a duty under it. However, plaintiff asserts that defendant L & A, by contracting to install the carport, owed her a common law duty to exercise reasonable care in performing its contractual duties.

Under *Fultz v Union Commerce Assocs*, 470 Mich 460, 467; 683 NW2d 587 (2004), a tort action based on a contract and brought by a plaintiff who is not a party to that contract is to be examined according to a "separate and distinct" approach. In *Fultz*, the plaintiff injured her ankle when she slipped and fell in an icy parking lot. *Id*. at 462. The plaintiff alleged a negligence claim against the contractor that the parking lot owner hired to salt and plow the lot. *Id*. The plaintiff contended that the contractor owed her a common law duty to exercise reasonable care in performing its contractual duties and breached that duty when it failed to salt

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[1] Plaintiff's premises liability claim against defendant Sarber was dismissed on the ground that the condition created by the placement of the downspout was open and obvious.

and plow the lot within a reasonable time. *Id*. at 463-464. Our Supreme Court stated that "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467. The *Fultz* Court concluded that the plaintiff's claim failed because she asserted that the contractor breached its contract with the owner of the parking lot by failing to fulfill its contractual duty to salt and plow the parking lot but did not assert a duty owed to her that was independent of the contract. *Id*. at 468.

As in *Fultz*, plaintiff has failed to allege a duty owed to her independent of the carport construction contract. Rather, plaintiff primarily alleged that defendant L & A acted negligently by "[f]ailing to properly place, assemble, and inspect the carport gutter downspouts…." In other words, plaintiff claimed defendant L & A did not perform portions of the carport construction properly. Because the installation of a gutter downspout was part of the construction contract, plaintiff's claim is based on the contract between the two defendants. Therefore, plaintiff fails to meet the threshold requirement of establishing a duty that defendant L & A owed to her under the "separate and distinct" approach. *Fultz*, *supra* at 467. Accordingly, we conclude that the trial court properly granted defendant L & A's motion for summary disposition and dismissed plaintiff's complaint.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens